

FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT**SENSITIVE**

MUR: 4982

DATE COMPLAINT FILED: March 6, 2000

DATES OF NOTIFICATION: March 10 and 28,
2000

DATE ACTIVATED: April 9, 2001

EXPIRATION OF STATUTE OF
LIMITATIONS: March 1, 2005

STAFF MEMBER: Tony Buckley

COMPLAINANT: Roy Fletcher, Deputy Campaign Manager
McCain 2000

RESPONDENTS: Bush for President, Inc. and David Herndon, as treasurer
Republicans for Clean Air
Sam Wyly
Charles Wyly
Lydia Meuret
Jeb Hensarling

RELEVANT STATUTES: 2 U.S.C. § 431(4)(A)
2 U.S.C. § 431(9)(A)(i)
2 U.S.C. § 431(11)
2 U.S.C. § 431(17)
2 U.S.C. § 431(18)(A)
2 U.S.C. § 434(c)(1)
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(a)(3)
2 U.S.C. § 441a(f)
11 C.F.R. § 100.22

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

22.04.405.3599

I. GENERATION OF MATTER

This matter was initiated by a complaint filed on March 6, 2000, by Roy Fletcher, Deputy Campaign Manager of McCain 2000, the principal campaign committee of Senator John McCain in the contest for the 2000 Republican presidential nomination. Complainant alleges that Charles and Sam Wyly, using the name Republicans for Clean Air, made an illegal in-kind contribution to Bush for President, Inc., the principal campaign committee of then-Governor George W. Bush, through the broadcast of a television advertisement allegedly containing express advocacy in the week before the 2000 California, New York and Ohio Republican presidential primaries.

Respondents were notified of the complaint by letters dated March 27 and 28, 2000. A response from Bush for President, Inc. ("Bush Committee") was received on May 4, 2000. A joint response from Republicans for Clean Air ("RFCA"), Sam Wyly, Charles Wyly, Lydia Meuret and Jeb Hensarling (collectively "RFCA Respondents"), was received on April 17, 2000. This latter response included sworn affidavits from Jeb Hensarling and Sam and Charles Wyly.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

1. Expenditures and Contributions

Pursuant to the Federal Election Campaign Act of 1971, as amended ("the Act"), an expenditure is generally defined as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). Similarly, a contribution is "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the

purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). An independent expenditure is "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. § 431(17). The term "clearly identified" means, *inter alia*, that the name of the candidate involved appears. 2 U.S.C. § 431(18)(A).

2. Express Advocacy

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986) ("MCFL"), the Supreme Court, relying on its earlier decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) ("*Buckley*"), held that the prohibition on corporate expenditures at 2 U.S.C. § 441b applies only to expenditures for communications that contain "express advocacy" of the election or defeat of clearly identified candidates for federal office. 479 U.S. at 249. In *Buckley*, the Court provided an illustrative, but non-exclusive, list of the words or phrases, including "support," that constitute express advocacy. See 424 U.S. at 44 n. 52. Subsequently, in *MCFL*, the Court found that a newsletter which did not contain any of the precise phrases set forth in *Buckley* nonetheless contained words which were "in effect" express advocacy. See 479 U.S. at 249.

Although the Supreme Court in *MCFL* held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b," 479 U.S. at 249, the Court demonstrated in that case that the prohibition could be applied to a communication containing both issue and express advocacy. In *MCFL*, the Court analyzed both the focus and content of an

MCFL newsletter that urged readers to "Vote PRO-LIFE" to ascertain whether its overall "effect" was that of "discussion of issues" or "exhortation to vote for particular persons." The newsletter listed all the candidates running for election in Massachusetts and identified each as supporting or opposing certain issues, but featured pictures of only those candidates whose pro-life positions were consistent with those of MCFL. *Id.* at 243. Based on these facts, the Court held that the newsletter contained "express advocacy":

The publication not only urges voters to vote for "pro-life" candidates, but also identifies and provides photographs of specific candidates fitting that description. The [newsletter] cannot be regarded as a mere discussion of public issues that by their nature raise the names of certain politicians. Rather, it provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature. The [newsletter] goes beyond issue advocacy to express electoral advocacy. The disclaimer cannot negate this fact.

Id. at 249. See also *FEC v. Furgatch*, 807 F. 2d 857, 862 (9th Cir.), *cert. denied*, 484 U.S. 850

(1987) ("*Furgatch*") ("[E]xpress advocacy is not strictly limited to communications using certain key phrases.")

In 1995, the Commission promulgated 11 C.F.R. § 100.22 to provide guidance on the concept of express advocacy in accordance with judicial interpretations, including *Buckley*, *MCFL*, and *Furgatch*. The final rule, in its entirety states:

Expressly advocating means any communication that –

- (a) uses phrases such as "vote for the President," "re-elect your congressman," "support the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life," or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied

1 by a picture of one or more candidate(s), "reject the
2 incumbent," or communications of campaign slogan(s) or
3 individual word(s), which in context can have no other
4 reasonable meaning than to urge the election or defeat of one or
5 more clearly identified candidate(s), such as posters or bumper
6 stickers, advertisements, etc. which say "Nixon's the One,"
7 "Carter '76", "Reagan/Bush," or "Mondale!"; or

8 (b) When taken as a whole and with limited reference to external
9 events, such as the proximity to the election, could only be
10 interpreted by a reasonable person as containing advocacy of
11 the election or defeat of one or more clearly identified
12 candidate(s) because-

13 (1) The electoral portion of the communication is
14 unmistakable, unambiguous, and suggestive of only one
15 meaning; and

16 (2) Reasonable minds could not differ as to whether it
17 encourages actions to elect or defeat one or more clearly
18 identified candidate(s) or encourages some other kind
19 of action.¹
20

21 The issue of express advocacy was once again addressed by a federal court in the case of
22 *FEC v. Christian Coalition*, 52 F.Supp. 2d 45 (D.C.D.C. 1999) ("*Christian Coalition*"). Basing
23 its decision on prior case law, particularly *MCFL*, the court declared that, to be express advocacy,
24 a communication must "in effect contain an explicit directive," which takes the form of an
25 "action verb or its functional equivalent." *Id.* at 62. According to the *Christian Coalition* court,
26 once the identity of the speaker (organization paying for the communication) and the content of
27 the communication are proven, a communication will be considered express advocacy only when
28 a reasonable person would understand that the speech used, considered in the context of the

¹ Two appellate courts have determined that part (b) of this regulation is invalid. *Maine Right to Life v. FEC*, 98 F.3d 1 (1st Cir. 1996) and *FEC v. Virginia Society for Human Life, Inc.*, No. 00-1252 (4th Cir. filed September 17, 2001) ("*VSHL*") (in which the court of appeals affirmed the district court's decision that section 100.22(b) was unconstitutional, but vacated the district court's injunction which prohibited the Commission from seeking to enforce section 100.22(b) against any party in the United States; the court of appeals remanded that part of the case for a modification of the injunction to apply to VSHL only). The Commission recently had petitioned the Fourth Circuit for rehearing, and rehearing *en banc* in *VHSL*, on the issue of the constitutionality of 11 C.F.R. § 100.22(b); but that petition was denied on November 13, 2001. In addition, a district court in which the advertisements at issue were broadcast has also held subpart (b) to be unconstitutional. See *Right to Life of Dutchess County, Inc. v. FEC*, 6 F.Supp.2d 248 (S.D.N.Y. 1998).

entire communication, contained an explicit directive to take electoral action in support of the election or defeat of a clearly identified candidate. *Id.* at 62. The court ruled that it is a pure question of law as to whether a reasonable person would understand the communication to expressly advocate a candidate's election or defeat.²

3. Coordination

On November 30, 2000, the Commission approved a final rule concerning Coordinated General Public Political Communications. 65 Fed. Reg. 76,138 (December 6, 2000). The new regulation, codified at 11 C.F.R. § 100.23, became effective on May 9, 2001. *See* 66 Fed. Reg. 23,537 (May 9, 2001). In the context of expenditures by outside groups which are not political party committees, the Commission has considered potential coordination that took place prior to the effective date of 11 C.F.R. § 100.23 under the standards set forth in *Christian Coalition*.

In addressing the issue of what constitutes "coordination" with a candidate, the *Christian Coalition* court discussed two general ways in which coordination could occur: first, that "expressive coordinated expenditures made at the request or the suggestion of the candidate or an authorized agent" would be considered coordinated; and second,

absent a request or suggestion, an expressive expenditure becomes "coordinated" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode or intended audience (e.g., choice between newspaper or radio advertisement); or (4) 'volume' (e.g., number of copies of printed materials or frequency of media spots).

Id. at 92.

² The *Christian Coalition* court further determined that express advocacy is not required if the communication in question has been coordinated with the political committee benefiting from it. *Id.* at 87, n. 50.

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1 The court specifically found that coordination might be established if an individual had a
2 certain level of decisionmaking authority for both the spender and the campaign and the spender
3 made the expressive expenditures to assist the campaign. *Id.* at 96-97. In one of the fact patterns
4 in *Christian Coalition*, the Commission alleged that an individual who was a volunteer for both
5 the Coalition and a congressional campaign had essentially coordinated distribution of Coalition
6 voter guides based on his extensive inside knowledge of the campaign's plans, projects and
7 needs. The court declined to find coordination on the facts presented. The court found that
8 "coordination cannot be inferred merely from the fact that the [individual] wore two caps,"
9 stating that the "veil-piercing approach . . . may be appropriate if an individual had more
10 complete decisionmaking authority for both a corporation and a campaign and the evidence
11 indicated that corporate decisions to make expressive expenditures were taken to assist the
12 campaign." *Id.* Thus, it appears that, under *Christian Coalition*, coordination of "expressive"
13 expenditures through an individual might also occur where the individual has
14 substantial decisionmaking authority for both the purported contributor and the purported
15 recipient regarding the content, timing, location, mode, intended audience, or volume of public
16 communications, and the expenditures for the communications were taken to assist the campaign.

17 4. Political Committee

18 Political committees which are not authorized campaign committees or separate
19 segregated funds "shall file a statement of organization within 10 days after becoming a political
20

1 committee within the meaning of section 431(4)." 2 U.S.C. § 433(a). "The statement of
2 organization of a political committee shall include . . . the name, address, relationship, and type
3 of any connected organization or affiliated committee." 2 U.S.C. § 433(b)(1). The treasurer of
4 each political committee must regularly file disclosure reports with the Commission. 2 U.S.C.
5 § 434(a)(1).

6 The Act defines a political committee as "any committee, club, association, or other
7 group of persons which receives contributions or makes expenditures aggregating in excess of
8 \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A). For the purposes of the Act, the term
9 "person" is defined as including "an individual, partnership, committee, association, corporation,
10 labor organization, or any other organization or group of persons" 2 U.S.C. § 431(11).

11 In *Buckley*, the Supreme Court construed the Act's references to "political committee" in
12 such a manner as to prevent the Act's "reach [to] groups engaged purely in issue discussion."
13 424 U.S. at 79. The Court recognized that "[t]o fulfill the purpose of the Act [the designation
14 'political committee'] should encompass organizations that are under the control of a candidate
15 or the major purpose of which is the nomination or election of a candidate." *Id.*

16 In *MCFL*, the Supreme Court analyzed whether a non-profit advocacy corporation that
17 had made more than \$1,000 in independent expenditures was a political committee. The Court
18 noted that the "central organizational purpose" of *MCFL*, which it found to be issue advocacy,
19 did not meet the *Buckley* definition of a political committee, *i.e.*, it was not controlled by a

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1 candidate and its major purpose was not the nomination or election of a candidate. 479 U.S.
2 at 252, n.6. The *MCFL* Court also noted, however, that should the organization's "independent
3 spending become so extensive that the organization's major purpose may be regarded as
4 campaign activity, the corporation would be classified as a political committee." 479 U.S. at
5 262.

6 The Commission has taken the position that, "[w]hen determining if an entity should be
7 treated as a political committee, . . . the standard used is whether an organization's major purpose
8 is campaign activity; that is, making payments or donations to influence any election to public
9 office." Advisory Opinion 1996-3.³

10 5. Contribution Limitations

11 Pursuant to 2 U.S.C. § 441a(a)(1)(A), it is illegal for any person to make contributions to
12 any candidate and his authorized political committee with respect to any Federal election which,
13 in the aggregate, exceed \$1,000. Likewise, it is illegal for any person to make contributions
14 aggregating more than \$25,000 in any calendar year. 2 U.S.C. § 441a(a)(3). No political
15 committee may accept contributions made in excess of the limits found at section 441a(a).
16 2 U.S.C. § 441a(f).

17

³ In *Akins v. FEC*, 101 F.3d 731 (D.C. Cir. 1996) (*en banc*), the court held that the Commission's application of the "major purpose" test to find political committee status was inappropriate. The court held that the statutory language defining "political committee" is not ambiguous, 101 F.3d at 740, but further noted that the Supreme Court's discussion of "major purpose" in *Buckley* and *MCFL* applied only to independent expenditures, not to coordinated expenditures and direct contributions. *Id.* at 741-42. The Supreme Court subsequently vacated this decision for other reasons, *see FEC v. Akins, et al.*, 524 U.S. 11 (1998), without ruling on the criteria for an organization to be deemed a "political committee."

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B. The Complaint

According to the complaint, television viewers in three states holding primary elections were "subjected to a media buy of \$2.5 million by the Wyllys through 'Republicans for Clean Air,' a group that appears to exist (if at all) for the sole purpose of producing and distributing this advertisement." Complainant points out that "Republicans for Clean Air" is not a registered entity with the Commission, and that "[w]hen the advertisement first began to air, the only address the group gave to television stations was a Virginia post office box belonging to Lydia Meuret," whom Complainant identifies as a consultant "who works for a political action committee headed by U.S. Representative Henry Bonilla," a Bush supporter.

Complainant notes that a March 2, 2000, press release "finally stated that the true sponsors were Charles and Sam Wyly." Complainant alleges that "[t]he press release . . . confirmed that the group was 'created' only last week; its only action has been to produce and run the attack advertisement in key primary states; and its only identified contributors are the Wyllys." Complainant suggests that Charles and Sam Wyly purposefully obscured their involvement with the advertisement due to their past connections with George W. Bush.⁴

Complainant also notes that Charles Wyly is one of the Bush campaign's "Pioneers." Complainant states that the Bush campaign listed the Pioneers on its website as a fundraising group, and that the Bush campaign worked closely with the Pioneers in their fundraising efforts.

⁴Complainant notes that Sam and Charles Wyly gave more than \$200,000 to George W. Bush's two Texas gubernatorial campaigns. Beyond their electoral support, Complainant mentions that the Wyllys run an investment fund that manages almost \$100 million for the University of Texas, whose board was appointed by Governor Bush, and that the Wyllys are paid an annual fee of \$1 million plus 20% of the profits for this service.

1 The complaint quotes several newspaper articles about the Pioneers, which indicate that the
2 Pioneers were briefed on the campaign's spending plans and that the Pioneers' fundraising
3 efforts were discussed with the Bush campaign.⁵ Complainant concludes that because Charles
4 Wyly was authorized to raise funds on behalf of the Bush Committee,⁶ and because the
5 advertisement was intended to influence a federal election, Charles Wyly's payment in
6 connection with the advertisement constitutes an illegal in-kind contribution, citing 2 U.S.C.
7 § 441a(a), (f) and 11 C.F.R. §§ 100.8(a)(1) and 109.1(c); and *Christian Coalition* at 86-89.
8 Complainant points out that Charles Wyly had previously made a \$1,000 contribution to the
9 Bush Committee, and thus was unable to contribute any more.

10 The complaint mentions another connection involving Charles Wyly's status as a Pioneer,
11 noting that the advertisement aired "with the assistance of a political consultant, Jeb Hensarling,
12 who is a former business partner of the chairman of the Pioneers (James B. Francis, Jr.)." The
13 complaint also notes connections between the advertising firm that placed the commercial and
14 other supporters of George W. Bush.

15 Complainant has provided scripts for the advertisement. The content of the
16 advertisement is the same for each State in which the advertisement ran, except that the name of

⁵ The cited articles appeared in *The Washington Post*, the *Saint Petersburg Times* and *The New York Times*.

⁶ Complainant notes that, absent authorization from the Bush campaign, both Charles Wyly and the Bush campaign would have been in violation of the Commission's "earmarked contribution" regulations, as Charles Wyly would otherwise have been a conduit for earmarked contributions, and both he and the Bush Committee would have been required to file reports about his activity as a conduit. As such reports were not filed, Complainant argues, the Bush Committee and Mr. Wyly "have implicitly taken the legal position that Pioneers such as Charles Wyly are authorized fundraisers and occupy 'significant position[s]' within the campaign."

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1 the State mentioned reflects where the advertisement was being broadcast. For example, the
2 Ohio advertisement ran as follows:

VISUAL

AUDIO

MCCAIN PHOTO OVER POLLUTION

**McCain Voted Against Clean Energy
Paid for by Republicans for Clean Air
McCain's Vote Means More Coal**

Last year, John McCain voted against solar and renewable energy. That means more use of coal-burning plants that pollute our air.

**NY SKYLINE W/ STATUE LIB
BUSH NAME W/ SKY: BUSH**

Ohio Republicans care about clean air. So does Governor Bush.

**SMOKESTACKS W/ CLEAR DAWN
Bush Clamped Down On Polluters**

He led one of the first states in America to clamp down on old, coal-burning electric power plants.

**BUSH PHOTO OVER GREEN FIELD
Bush Signed Clean Air Laws**

Bush clean air laws will reduce air pollution more than a quarter million tons a year.

YOUNG PEOPLE W/ CANOE

That's like taking five million cars off the road.

**BUSH NAME W/ KIDS: BUSH
Let Bush & McCain Know You Back Clean Energy**

Governor Bush. Leading . . . so each day dawns brighter.

3
4 Complainant alleges that the advertisement constitutes express advocacy. Citing

5 11 C.F.R. § 100.22, Complainant states that:

6 express advocacy includes both (1) the use of "slogan(s) or
7 individual word(s)" that "in context" can have "no other reasonable
8 meaning" than to urge the election or defeat of a clearly identified

1 candidate, and (2) communications that "[w]hen taken as a whole
2 and with limited reference to external events" could "only be
3 interpreted by a reasonable person" as containing advocacy of the
4 election or defeat of a clearly identified candidate.
5

6 Complainant asserts that the advertisement meets either definition. Regarding the first
7 definition, Complainant states that the "closing line — 'Governor Bush: Leading so each day
8 dawns brighter' — is a clear slogan that, especially given the commercial's timing and
9 denigration of Senator McCain, can be understood only as expressly advocating" the election of
10 George W. Bush. Complainant asserts that that slogan is no different from the examples of
11 slogans occurring in the Commission's regulations at 11 C.F.R. § 100.22(a) which constitute
12 express advocacy: "Nixon's the One" and "Mondale!"

13 Regarding the second definition, Complainant notes that the advertisement contrasts the
14 two candidates' records, specifically mentions New York, Ohio and California Republicans as
15 the target audiences, and "closes with the pro-Bush slogan discussed above." Complainant
16 suggests that the only reason an advertisement would present a comparison of the environmental
17 records of a Texas governor and an Arizona senator to Republican audiences in New York, Ohio
18 and California on the weekend before the primary election in each of those states would be
19 express advocacy. Complainant asserts that "the advertisement contains *no other* call to action or
20 alternative exhortation: Viewers are not asked to support legislation, or to call an officeholder,
21 but only given a campaign slogan favoring Governor Bush." (Emphasis in original.)

22 Complainant finally asserts that the Wyls engaged in express advocacy within 20 days
23 prior to an election, and thus were required to report their expenditure within 24 hours of making
24 it, citing 11 C.F.R. §§ 104.4 and 109.2(b), and further that the Wyls failed to do so.
25

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C. The Responses

1. The Bush Committee

The Bush Committee, through counsel, states that the advertisement in question did not contain express advocacy, and was not subject to regulation. Citing *Buckley* and *MCFL*, the Bush Committee states that the United States Supreme Court has repeatedly held that public communications may only be restricted under the Act if they expressly advocate the election or defeat of a clearly identified candidate. According to the Bush Committee, in determining whether a communication contains express advocacy, "federal courts have repeatedly rejected attempts to look beyond the literal words of a communication and delve into subjective inquiries such as the effect on the viewer or listener, or the timing of the communication."⁷

The Bush Committee states that the RFCA advertisement "does not contain words or visuals that expressly advocate the election or defeat of a clearly identified candidate." The Bush Committee notes that the advertisement makes no reference to any primary election, or to any election whatsoever. "Rather, the advertisement discusses the issue of solar and renewable energy, the dangers of coal burning electric power plants, and outlines Senator McCain's and Governor Bush's public records on these issues." The Bush Committee also cites a specific call to action in the ad: "Let Bush and McCain Know You Back Clean Energy."

Regarding the issue of coordination,⁸ the Bush Committee notes that the standard "for public communication to be regulated under the Act as coordinated speech" is the *Christian*

⁷ The cases cited by the Bush Committee are *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45, 53 (2d Cir. 1980); *Clifton v. FEC*, 927 F. Supp. 493, 497-98 (D. Me. 1996), *aff'd on alternate grounds*, 114 F.3d 1309 (1st Cir. 1997); and *FEC v. Christian Action Network*, 110 F.3d 1049, 1051 (4th Cir. 1997).

⁸ The Bush Committee takes the position that the Commission can dismiss the complaint solely on the basis that the advertisement does not contain express advocacy, regardless of the issue of coordination.

1 *Coalition* standard, discussed *supra*. The Bush Committee argues that, "[u]nder this standard, a
2 campaign's mere discussion with, inquiry into or knowledge of a spender's activities is
3 insufficient to establish coordination." The Bush Committee further argues that "[a]n awareness
4 by the campaign of the general content of a communication, or financial assistance by the
5 candidate -- in the form of a fundraising appearance for the spending group or an outright
6 donation to the group -- does not constitute coordination in the absence of more specific
7 negotiations," citing *Christian Coalition* at 93-95.

8 With respect to the allegations involving Charles Wyly, the Bush Committee response
9 acknowledges that he "is a 'Pioneer' for [the Bush Committee] and, as such, is a contributor and
10 an authorized fundraiser for the campaign." It goes on to state:

11 In this capacity, Mr. Wyly did not and does not exercise any decision
12 making authority over any of [the Bush Committee's] political, strategic or
13 spending decisions. In addition, there is no evidence that any person with
14 any involvement with [the Bush Committee's] political, strategic or
15 spending decisions was privy to or had any involvement with the RFCA
16 issue advertisements. In fact, the evidence clearly indicates that [the Bush
17 Committee's] only knowledge of [RFCA] and its issue advertisements is
18 what [the Bush Committee] has learned from media reports.

19
20 **2. Republicans for Clean Air, *et al.***

21 The RFCA Respondents, through counsel, state in their joint response that the RFCA is a
22 "non-profit, non-stock, public advocacy organization," which has as its principal purpose "the
23 public advocacy of national environmental matters, including pending and proposed federal
24 legislation on clean air issues." They state that the RFCA is a section 527 organization (pursuant
25 to the Internal Revenue Code); that it is not a political committee; and that it is not affiliated with
26 any separate segregated fund, national or local committee of any political party, any federal, state

1 or local candidate's principal campaign committee, or with any multi-candidate political
2 committee or any delegate committee.

3 The RFCA Respondents state that the initial concept for the RFCA began in the spring of
4 1999, when Sam Wyly "determined there might be the need for the development of a grass-roots,
5 free-market oriented environmental organization for the new century." The RFCA Respondents
6 further state that Sam Wyly took his concept to Jeb Hensarling, who had been a consultant to
7 several Wyly family businesses; Mr. Hensarling researched the viability of such an organization,
8 and determined that such a group "could effectively function and provide thoughtful
9 environmental advocacy."

10 The RFCA Respondents assert that, after an unstated period of time during which no
11 attempts to advance this project were made, Sam Wyly again approached Mr. Hensarling, and
12 indicated that he wished to "initiate the formation of a clean air advocacy group." Further, he
13 "expressed his interest in broadcasting a series of clean air issue advertisements at some point in
14 the future." The RFCA Respondents assert that Sam Wyly had two goals for his group: 1) "to
15 foster an increased national interest in and awareness of the clean air issue;" and 2) "to explore
16 the possibility of broadcasting the group's policy views via public advertising in New York and
17 California during the Republican primary season."

18 The RFCA Respondents state that after this second contact, Mr. Hensarling contacted an
19 attorney versed in election law to provide guidance.⁹ The attorney purportedly counseled
20 Mr. Hensarling on how the group could successfully operate within the confines of section 527
21 and outside the strictures of the Act. The response states that Mr. Hensarling informed Mr. Wyly
22 of the attorney's advice.

⁹ The attorney is identified as Jan W. Baran, Esq. of the firm of Wiley, Rein & Fielding in Washington, D.C.

1 According to the RFCA Respondents, the advertisement which is the subject of this
2 matter was filmed over a three-day weekend in late February 2000. The RFCA Respondents
3 assert that the attorney whose advice had previously been relied on was consulted about the
4 proposed text and visual content for the advertisement, and he approved them both. The
5 response states that Sam Wyly initially paid all the expenses associated with the project from
6 personal funds.¹⁰

7 The RFCA Respondents assert that,

8 [b]ecause Mr. Sam Wyly hoped that the issue advertisements would have
9 the maximum desired impact on the public, opinion leaders, the news
10 media and those Republican Party supporters who might be sympathetic to
11 the message, he decided to purchase time and air the advertisements in
12 New York State, Ohio and in the San Francisco area of California. In
13 selecting the geographical areas in which to purchase broadcast time for
14 the advertisements, no contact was made or coordination attempted with
15 any Republican Presidential candidate or committee. As indicated,
16 Mr. Sam Wyly wanted the issue advocacy advertisements to have the
17 greatest possible impact with the target audience. Purchasing broadcast
18 time incident to but not in connection with the pending Republican
19 Presidential primaries in New York and California made obvious
20 marketing sense to Mr. Wyly.

21
22 The RFCA Respondents further assert that, in contracting with local stations for
23 broadcast time, the local stations required that an individual be identified to serve as the point of
24 contact between the station and RFCA. Mr. Hensarling contacted Lydia Meuret, who is
25 described by the RFCA Respondents as a friend of Mr. Hensarling from Texas politics, and
26 contracted with her for her temporary services in that role. Ms. Meuret assertedly had no other
27 role with respect to the advertisement or the RFCA.

28

¹⁰ The response states that the companies eventually hired by RFCA assured Mr. Hensarling that they had no relationships with Republican presidential candidates.

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1 The RFCA Respondents assert that RFCA was initially identified as the sponsor of the
2 advertisement, and not Mr. Wyly, for two reasons: "(1) to maximize the time that RFCA and its
3 clean air message would remain a news story, and (2) to build name identification for RFCA
4 since RFCA was intended to be an on-going organization." The RFCA Respondents state that
5 they had determined that maximum interest in the advertisement and RFCA could be generated
6 by allowing up to a 48-hour news cycle to run between the airing of the advertisement and
7 identifying the individuals responsible for it. The RFCA Respondents assert that it was always
8 Sam Wyly's intention to disclose his connection to the RFCA, and that a press release (attached
9 to both the Complaint and this Response) doing so was issued the day after the advertisement
10 first aired, and before the news media broke the story of the Wyllys' connection.

11 The response states that Charles Wyly had no role in the development of the concept of
12 the RFCA, in the purchase of broadcast time, or in any aspect of the creation of the
13 advertisement. The response further states that Charles Wyly's only role was limited to
14 reimbursing his brother for a share of the costs associated with running the advertisement, after
15 the advertisement had been created and the airtime had already been purchased. Indeed, the
16 response states that Charles Wyly was only approached for assistance after the airtime had been
17 purchased, and that, until that point, Charles Wyly was "completely unaware of any element of
18 this project."

19 The RFCA Respondents state that the advertisement ran for several days in early March
20 2000 in New York, Ohio and parts of California.

21 The RFCA Respondents assert that RFCA is not a political committee because it had not
22 received a "contribution" or made an "expenditure" in excess of \$1,000 in either 1999 or 2000,
23 and that, specifically, the payments for the costs of producing and airing the advertisement in

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1 question do not meet the definition of expenditure because the payments "were not made 'for the
2 purpose of influencing any election for Federal office.'" Rather, the "exclusive purpose" was to
3 communicate with "the public on a public policy issue that was of importance to the RFCA and
4 its supporters." The RFCA Respondents cite Advisory Opinions 1983-12, 1987-07 and 1984-57
5 in support of their arguments. They claim that the Commission's regulations

6 specifically contemplate that certain organizations can engage in 'the promotion
7 of political ideas' which could include 'issue advocacy' and other forms of
8 'election influencing activity' without engaging in activity that would constitute
9 the acceptance of a 'contribution' or the making of a 'disbursement' as those
10 terms are defined in the Act (see 11 C.F.R. § 114.10(b)(1)).

11
12 The RFCA Respondents additionally assert that the advertisement does not contain
13 express advocacy. They state that "[t]he text and visual content of the advertisement clearly meet
14 the Commissions [sic] enunciated tests for valid 'issue advocacy.'" They contend that the
15 spoken text and the visual content "do not advocate the election or defeat of any identified
16 federal candidate," but "are exclusively focused on the public positions of two incumbent
17 politicians with respect to environmental issues generally and clean air legislation specifically."
18 The RFCA Respondents maintain that the "visual content of the issue advertisement closes with
19 the requisite 'call to action' by urging the viewer to call both Senator McCain and Governor
20 Bush to let each incumbent know that the viewer of the advertisement supports clean energy."

21 The response contains sworn affidavits from Jeb Hensarling and Sam and Charles Wyly,
22 which support the claims made in the response. In his affidavit, Mr. Hensarling states that he has
23 "read the formal response prepared by my counsel I believe that the submission accurately
24

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reflects the facts and circumstances, as I know them, surrounding the issue advocacy advertising campaign undertaken by RFCA earlier this year." Sam Wyly states that,

[o]perating on the advice of counsel, I was extremely careful throughout the development and implementation of the RFCA project to avoid having any contact or communication about the RFCA project with any federal candidate or committee or any agent of any federal candidate or committee. I can say with great assurance that I did not engage in any activity that could be considered coordination, on behalf of RFCA, with any federal candidate or committee.

Sam Wyly further states that he asked his brother Charles to reimburse him for costs of purchasing the airtime "[u]pon completion of the purchase of the broadcast airtime," and that prior to this request, Charles Wyly "had absolutely no knowledge about any aspect of the RFCA issue advocacy initiative." Charles Wyly, in his affidavit, affirms his brother's statements that, prior to being approached by his brother to contribute to the RFCA project, he had no knowledge of any activity undertaken by RFCA, or indeed of RFCA or its "proposed issue advocacy initiative." Charles Wyly further states that because he had no such knowledge, he "could not have communicated with the Bush Presidential campaign about the RFCA initiative or coordinated the RFCA activity with the Bush Presidential campaign."

D. Analysis

1. Express Advocacy Issues

The advertisement in question was broadcast in three states, California, New York and Ohio, from March 1, 2000 to March 3, 2000. Each state was holding its presidential primary election on March 7, 2000. The content of the advertisement appears *supra*.

The advertisement contrasts George W. Bush in a favorable manner to John McCain on the issue of clean air. John McCain is charged with voting against legislation intended to

1 promote clean air. The advertisement states that George W. Bush, in contrast, cares about clean
2 air, and that as Governor, he led efforts to combat air pollution.

3 The advertisement contains a call to action: "Let Bush & McCain Know You Back Clean
4 Energy." Although the RFCA Respondents suggest that the call to action "urg[es] the viewer to
5 call both Senator McCain and Governor Bush to let each incumbent know that the viewer of the
6 advertisement supports clean energy," the call to action is not as specific as they suggest.
7 Viewers are not urged to "call," merely to "let [them] know." Moreover, no information, such as
8 phone numbers or addresses, is provided by which viewers could know how to contact McCain
9 or Bush. Nevertheless, the action viewers are called to take is not necessarily electoral activity,
10 and thus the advertisement is not so explicit that it "in context can have no other reasonable
11 meaning than to urge the election or defeat of" George W. Bush or John McCain.

12 Complainant also specifically alleges that the phrase, "Governor Bush. Leading . . . so
13 each day dawns brighter," constitutes express advocacy, comparing it to slogans such as
14 "Nixon's the One" and "Mondale!" found in section 100.22(a). Complainant, however,
15 incorrectly compares the slogan in the RFCA advertisement to those found in the Commission's
16 regulation. The Commission's references to "Nixon's the One" and "Mondale!" are examples of
17 slogans that may appear on "posters, bumper stickers, advertisements, etc." -- situations where
18 the phrase stands alone. Here, the phrase cited by Complainant is part of a television
19 advertisement, which, as analyzed above, does not constitute express advocacy pursuant to
20 11 C.F.R. § 100.22(a).

21 Nor does the advertisement contain express advocacy "[w]hen taken as a whole and with
22 limited reference to external events, such as the proximity to the election." 11 C.F.R.
23 § 100.22(b). Although the advertisement ran in three states just prior to the primary election, and

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1 compared officeholders who were both Republican presidential candidates, the advertisement
2 does not mention that election, or that the two officeholders were candidates. This is in contrast
3 to the communication in *Furgatch*, where the election and Jimmy Carter's campaign were
4 specifically mentioned. As a result, the "electoral portion" of the advertisement is not
5 "unmistakable, unambiguous, and suggestive of only one meaning," 11 C.F.R. § 100.22(b)(1),
6 and reasonable minds could, as set forth above, differ as to the type of action it encourages.¹¹
7 11 C.F.R. § 100.22(b)(2).

8 2. Coordination

9 As noted above, the *Christian Coalition* court discussed two general ways in which
10 coordination could occur. First, "expressive coordinated expenditures made at the request or the
11 suggestion of the candidate or an authorized agent" would be considered coordinated.
12 52 F. Supp.2d at 92. In this matter, there is no information, especially given the sworn affidavits
13 of Sam and Charles Wyly, that anyone connected to the Bush Committee asked for the
14 advertisement, or was even aware of the advertisement until after it had already been created and
15 time for its broadcast had been secured. Although Complainant lists various relationships
16 between persons and institutions associated with the advertisement and George W. Bush or his
17 campaign, Complainant does not allege that these relationships are evidence of actual
18 coordination. Rather, Complainant concludes that these relationships create a presumption of
19 coordination. At the time of the events in this matter, one portion of the Commission's

¹¹ Sam Wyly is quoted in an Associated Press report as discussing his "recent foray into presidential politics. . . . I thought I had a clever idea to get America to focus on the clean air issue and to help my presidential candidate." Laura Meckler, Bush benefactor bids farewell to political ad business, Associated Press State & Local Wire (April 4, 2000) (available on-line at: <<http://www.boycottgreenmountain.com/mccain-ads-ap.html>>). Mr. Wyly's intent, however, is irrelevant to the consideration of whether the ads themselves constitute express advocacy. See *Explanation and Justification, for Regulations on Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 FR 35292, 35295 (July 6, 1995).

1 regulations regarding independent expenditures, 11 C.F.R. § 109.1(b)(4)(i)(B), which
2 Complainant relies on, stated that an expenditure would be presumed to be coordinated if it was
3 made "by arrangement, coordination, or direction by the candidate" or the candidate's agent, and
4 that the communication would be presumed to be so made when it is "[m]ade by or through any
5 person who is . . . authorized to raise or expend funds." However, that presumption could be
6 overcome by evidence to the contrary, which is provided here by the Wylys' affidavits. Further,
7 section 109.1 has since been revised, in part, to eliminate any presumption of coordination, based
8 on overbreadth concerns.¹²

9 Second, the *Christian Coalition* court determined that
10 absent a request or suggestion, an expressive expenditure becomes "coordinated"
11 where the candidate or her agents can exercise control over, or where there has
12 been substantial discussion or negotiation between the campaign and the spender
13 over, a communication's: (1) contents; (2) timing; (3) location, mode or intended
14 audience (e.g., choice between newspaper or radio advertisement); or
15 (4) "volume" (e.g., number of copies of printed materials or frequency of media
16 spots).
17
18 52 F. Supp.2d at 92.

19 Both the Bush Committee and Sam Wyly, in his affidavit, deny contact concerning the
20 advertisement prior to the broadcasts. Charles Wyly, in his affidavit, avers that he did not
21 discuss the advertisement with the Bush campaign before Sam Wyly requested reimbursement
22 because he did not know about the advertisement. Although Charles Wyly contributed funds to
23 defray Sam Wyly's costs associated with the advertisement, no information in the Commission's
24 possession contradicts the assertions by Sam and Charles Wyly that these funds were provided
25 only after the time for the broadcast of the advertisement had been secured; the provision of these

¹² See *Explanation and Justification for Regulations on General Public Political Communications Coordinated With Candidates and Party Committees; Independent Expenditures*, 65 FR 76138, 76145 (Dec. 6, 2000).

1 funds did not affect the content, timing, location, mode, intended audience or volume of the
2 broadcast.

3 As noted, *supra*, it appears that, under *Christian Coalition*, coordination of “expressive”
4 expenditures through an individual might also occur where the individual has substantial
5 decisionmaking authority for both the purported contributor and the purported recipient regarding
6 the content, timing, location, mode, intended audience, or volume of public communications, and
7 the expenditures for the communications were taken to assist the campaign. 52 F. Supp.2d
8 at 96-97. In *Christian Coalition*, in a fact pattern involving the principal campaign committee
9 for J.D. Hayworth for the House of Representatives seat from the Sixth District of Arizona, the
10 court noted that a Republican Party precinct committeeman, Tom Grabinski, was recruited to join
11 the Hayworth campaign’s finance committee. *Id.* at 79. Approximately five months later,
12 Grabinski was recruited by others to be the chairman of the Arizona Christian Coalition. *Id.*
3 According to the court, “Grabinski did not discuss his new role with the Coalition in much detail
14 with Hayworth.” *Id.*

15 For the general election, the Arizona Christian Coalition prepared a voter guide
16 comparing the records of Hayworth and his opponent. *Id.* at 80. Grabinski was responsible for
17 identifying churches where the guides could be distributed and for recruiting individuals to
18 distribute the guides. *Id.* There was no evidence that Grabinski discussed these decisions with
19 Hayworth. *Id.*

20 In determining that these facts did not give rise to a conclusion that coordination had
21 occurred, the *Christian Coalition* court noted that

22 Grabinski’s position in the campaign was such that his view of where the
23 campaign might want the guides distributed would not necessarily be the
24 candidate’s view. A veil-piercing approach to coordination may be

appropriate if an individual had more complete decisionmaking authority for both a corporation and a campaign and the evidence indicated that corporate decisions to make expressive expenditures were taken to assist the campaign. But on these facts, coordination cannot be inferred merely from the fact that the Coalition's voter guide distributor wore two caps. Some discussion or negotiation is required.

Id. at 96-97.

Here, Charles Wyly's role as an authorized fundraiser of the Bush Committee as one of its "Pioneers," gives rise to the allegation of coordination. The Bush Committee states in its response that Mr. Wyly "did not... exercise any decision making authority over any of the [Bush Committee's] political, strategic, or spending decisions," and that there is no evidence that any person with any involvement in these decisions had any involvement with the RFCA advertisement. On the other side of the transaction, Sam and Charles Wyly have averred that Charles Wyly did not become involved in the advertisement until after it had been created and until all airtime had been reserved, and that his only role was in paying for some of the costs already incurred. Thus, under the reasoning of the *Christian Coalition* court, there is insufficient evidence that Charles Wyly played any role in coordinating the broadcast of the advertisement in question with the Bush Committee.¹³

3. Political Committee Status

Under *Buckley*, *MCFL*, and *Christian Coalition*, a threshold determination for political committee status, where there is no coordination, is a federal "contribution" or "expenditure" in excess of \$1,000. As shown above, there is insufficient information to support finding coordination between the RFCA and the Bush Committee with regard to the advertisement.

¹³ Complainant does not allege, and there is no information to conclude, that Sam Wyly had any role with the Bush Committee, and, as noted *supra*, Sam Wyly, in his affidavit, and the Bush Committee, deny contact concerning the advertisement prior to the broadcasts.

1 Further, the advertisement does not contain express advocacy, and therefore there is no federal
2 contribution or expenditure in excess of \$1,000 with respect to the broadcasts. The RFCA's
3 Internal Revenue Service filings as a section 527 organization show no other activity at all.¹⁴

4 Accordingly, it does not appear that the RFCA is a political committee that was required
5 to register with the Commission and file periodic reports.

6 **III. CONCLUSIONS**

7 The advertisement run by RFCA did not contain express advocacy, nor does the available
8 information support a conclusion that RFCA coordinated with the Bush Committee with regard
9 to the advertisement. Thus, it appears that neither Charles nor Sam Wyly, nor Republicans for
10 Clean Air, made an excessive contribution to the Bush Committee in connection with the
11 advertisement, and the Bush Committee accordingly did not accept excessive contributions from
12 Sam or Charles Wyly, or Republicans for Clean Air, or fail to report them. Accordingly, this
13 Office recommends that the Commission find no reason to believe that Charles Wyly and Sam
14 Wyly violated 2 U.S.C. § 441a(a)(1)(A), (a)(3), that Republicans for Clean Air violated 2 U.S.C.
15 § 441a(a)(1)(A), or that Bush for President, Inc. and David Herndon, as treasurer, violated
16 2 U.S.C. §§ 434 and 441a(f). Furthermore, because the advertisement did not contain express
17 advocacy, RFCA had no obligation to file reports of an independent expenditure with the
18

¹⁴ The Internal Revenue Service makes reports filed by organizations registered under 26 U.S.C. § 527 available over the Internet. Reports for Republicans for Clean Air are located here:
<http://eforms.irs.gov/pac_list.asp?irs_pac_key=752865803>

Commission. Accordingly, this Office recommends that the Commission find no reason to believe that Republicans for Clean Air violated 2 U.S.C. § 434(c)(1).¹⁵

There are no specific allegations regarding the conduct of respondents Jeb Hensarling or Lydia Meuret.¹⁶ Accordingly, this Office recommends that the Commission find no reason to believe that Jeb Hensarling or Lydia Meuret violated the Act. Further, this Office recommends that the Commission close the file.

IV. RECOMMENDATIONS

1. Find no reason to believe that Charles Wyly violated 2 U.S.C. § 441a(a)(1)(A), (a)(3).
2. Find no reason to believe that Sam Wyly violated 2 U.S.C. § 441a(a)(1)(A), (a)(3).
3. Find no reason to believe that Republicans for Clean Air violated 2 U.S.C. § 441a(a)(1)(A).
4. Find no reason to believe that Bush for President, Inc. and David Herndon, as treasurer, violated 2 U.S.C. §§ 434 and 441a(f).
5. Find no reason to believe that Lydia Meuret violated the Act.
6. Find no reason to believe that Jeb Hensarling violated the Act.

¹⁵ Complainant's allegation that a report of this expenditure should have been filed within 20 days of the election was inconsistent with its allegation that the advertisement was coordinated with the Bush Committee. The RFCA would only have had to have filed such a report if the advertisement qualified as an independent expenditure, *i.e.*, if it had contained express advocacy and not been coordinated with the Bush Committee. *See* 2 U.S.C. § 434(c)(1). Nevertheless, because a specific allegation was made, this Office believes that it is the better course of action to specifically address it.

¹⁶ Complainant specifically named these individuals in the complaint as persons connected to the conduct at issue, and accordingly, they were notified of the complaint.

- 1 7. Find no reason to believe that Republicans for Clean Air violated 2 U.S.C. § 434(c)(1).
- 2
- 3 8. Approve the appropriate letters.
- 4
- 5 9. Close the file.
- 6
- 7
- 8
- 9

10 12/20/01
11 Date
12


Lawrence H. Norton
General Counsel


22.04.405.3626



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lawrence H. Norton
General Counsel

FROM: Office of the Commission Secretary 

DATE: January 11, 2002

SUBJECT: MUR 4982 - First General Counsel's Report
dated December 20, 2001
The above-captioned document was circulated to the Commission
on Thursday, December 20, 2001.

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Mason	—
Commissioner McDonald	<u>XXX</u>
Commissioner Sandstrom	—
Commissioner Smith	—
Commissioner Thomas	<u>XXX</u>
Commissioner Wold	—

This matter will be placed on the meeting agenda for

Tuesday, January 15, 2002.

Please notify us who will represent your Division before the Commission on this matter.